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OCTOBER TERM, 1994

THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., GROCERY MANUFACTURERS OF AMERICA, INC., THE SOAP AND DETERGENT ASSOCIATION, NATIONAL FOOD PROCESSORS ASSOCIATION, THE SOCIETY OF THE PLASTICS INDUSTRY, INC., AMERICAN FOREST & PAPER ASSOCIATION, THE AMERICAN ADVERTISING FEDERATION, THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, THE CALIFORNIA CHAMBER OF COMMERCE, and THE CHAMBER OF COMMERCE OF THE UNITED STATES,

Petitioners,

—v.—,

DANIEL LUNGREN, in his official capacity as Attorney General of the State of California, CALIFORNIANS AGAINST WASTE, and the ENVIRONMENTAL DEFENSE FUND,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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May 24, 1995

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QUESTIONS PRESENTED

1. May a state, consistently with the First Amendment to the United States Constitution, prohibit manufacturers and distributors from using specific language about environmental attributes of their consumer goods, except as specifically prescribed by the state, even though the language is truthful and not misleading?

2. May a state, consistently with the First Amendment to the United States Constitution, prohibit manufacturers and distributors from using specific language about environmental attributes of their consumer goods, except as specifically prescribed by the state, at the same time their critics are permitted to use the identical language about the same goods in an unrestricted manner?

PARTIES BELOW

The parties before this Court are those set forth in the caption. Since this action was initiated, one of the petitioners changed its name to American Forest & Paper Association from The American Paper Institute, Inc.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1, petitioners inform the Court that they have no parent companies and no subsidiaries other than wholly-owned subsidiaries.

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Petitioners,

—against—

DANIEL LUNGREN, in his official capacity as Attorney General of the State of California, CALIFORNIANS AGAINST WASTE, and the ENVIRONMENTAL DEFENSE FUND,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully submit that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case, filed on November 18, 1994, rehearing and rehearing *en banc* denied on February 23, 1995.

OPINIONS BELOW

The opinion of the court of appeals, written by Choy, J., and the dissent thereto by Noonan, J., is reported at 44 F.3d 726 and is reprinted in the Appendix hereto at 1a-33a. The denial of rehearing and rehearing *en banc* (62a-63a) is unreported. The district court opinion (34a-61a) is reported at 809 F. Supp. 747.

JURISDICTION

The opinion of the court of appeals from which petitioners seek review was filed on November 18, 1994. The court of appeals denied a timely petition for rehearing with suggestion for rehearing *en banc* on February 23, 1995. This petition is being timely filed within 90 days of that denial.

The jurisdiction of this Court to review the judgment of the court of appeals is invoked under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The texts of the First Amendment and the Fourteenth Amendment, Section 1, to the United States Constitution as well as the texts of 28 U.S.C. § 2201, 2202 (1988 & Supp. V 1993), 42 U.S.C. § 1983 (1988), and California Business and Professions Code §§ 17500, 17508, and 17508.5 (West 1987 & Supp. 1995) are set forth in the Appendix at 64a-69a and are listed in the Table of Contents thereto.

STATEMENT OF THE CASE

This petition stems from a constitutional challenge to Section 17508.5 of the California Business and Professions Code, a statute that seeks to regulate "green marketing." The statute provides that the words "recycled," "recyclable," "biodegrad-

able," "photodegradable" and "ozone friendly" may not be used by any manufacturer or distributor of consumer goods to describe those goods unless strict state-dictated statutory definitions are met. If the words are used in *any* other way—including ways entirely consistent with dictionary definitions and common usage—criminal punishments may follow. Under the statute, it is of no moment that information provided by use of the words in any way other than as prescribed by the legislature is entirely truthful and non-misleading. Nor, under the statute, is it relevant that consumers would receive *more* information about the environmental impact of products from the truthful and non-deceptive use of the now-forbidden language.

The statute permits critics of the ecologically oriented statements and behavior of manufacturers and distributors to use the state-defined terms as they like. But those subject to the statute must either use the words as prescribed or may not use them at all.

It is increasingly clear that consumers want to know how the products they buy and the packaging of those products will affect the environment. It is also clear that consumers learn about environmental attributes of goods and packages from advertisements and labels. Petitioners, who advertise and distribute consumer goods, want to speak to consumers via "green marketing." Petitioners have used and wish to continue to use the defined terms in truthful, non-deceptive ways other than as California has determined is appropriate. They are now barred, under threat of criminal sanctions, from doing so.

A. Factual Background of This Action

1. The Statute

Section 17508.5 of the California Business and Professions Code was enacted by the California legislature in 1990. As adopted, Section 17508.5 states:

It is unlawful for any person to represent that any consumer good which it manufactures or distributes is "ozone friendly," or any like term which connotes that stratospheric ozone is not being depleted, "biodegradable," "photodegradable," "recyclable," or "recycled" unless that consumer good meets the definitions contained in this section, or meets definitions established in trade rules adopted by the Federal Trade Commission.[1] For the purposes of this section, the following words have the following meanings:

(a) "Ozone friendly," or any like term which connotes that stratospheric ozone is not being depleted, means that any chemical or material released into the environment as a result of the use or production of a product, will not migrate to the stratosphere and cause unnatural and accelerated deterioration of ozone.

(b) "Biodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through natural biological processes into nontoxic carbonaceous soil, water, or carbon dioxide.

(c) "Photodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through physical processes, such as exposure to heat and light, into nontoxic carbonaceous soil, water, or carbon dioxide.

(d) "Recyclable" means that an article can be conveniently recycled, as defined in Section 40180 of the Public Resources Code, in every county in California with a population over 300,000 persons. For the purposes of

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[1] The Federal Trade Commission has not adopted trade rules defining any of the terms addressed in Section 17508.5 which would allow plaintiffs to avoid adherence to the statute's prescribed use of the regulated terms.

this subdivision, "conveniently recycled" shall not mean that a consumer good may be recycled in a convenience zone as defined in Section 14509.4 of the Public Resources Code.[2]

(e) "Recycled" means that an article's contents contain at least 10 percent, by weight, postconsumer material, as defined in subdivision (b) of Section 12200 of the Public Contract Code.

(f) "Consumer good" means any article which is used or bought for use primarily for personal, family, or household purposes.

(g) For the purposes of this section, a wholesaler or retailer who does not initiate a representation by advertising or by placing the representation on a package shall not be deemed to have made the representation.

(65a-66a) Violation of Section 17508.5 is punishable by imprisonment of up to six months and/or a fine. Civil penalties are also available.

2. Petitioners' Activities

Petitioners in this action are eight non-profit trade associations, The California Chamber of Commerce, and the Chamber of Commerce of the United States. (71a-75a) Petitioners' members have distributed and continue to distribute a wide variety of consumer goods to retailers in California, many of which are used or consumed every day by consumers. (75a) Others of petitioners' members manufacture the packaging for consumer products, including paper, plastic, glass and metal. (*Id.*)

Petitioners' members advertise and communicate to the public about consumer goods, products and packaging,

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[2] The portion of the statute defining "recyclable" was held to be unconstitutionally vague by the district court. (57a-59a) The State has not appealed that ruling.

including their environmental attributes, on product labels and in printed advertisements covered by the statute. (76a-79a) In their messages, petitioners' members have participated in the public debate on issues of solid waste disposal and protection of the environment. They have talked about their own efforts to mitigate the effects of their products and packaging on the solid waste stream. They have encouraged recycling through these messages both by educating consumers as to products and packages which can be recycled and by simply urging consumers to recycle. (*Id.*)

A typical message published in California by one of petitioners' members, Del Monte Foods Company, stated the following under the heading "PRECIOUS METAL":

> The "tin" can may just be the world's perfect container. It's made of durable, high grade steel that is completely recyclable.* It saves energy because it requires no refrigeration. And the can is made, shipped and stored more economically than other packages. So the dollars you spend go more to the food you eat than the package that contains it. The steel can. Precious little could be done to improve it.

(98a) The advertisement concluded with the phrase "Food for Thought" followed by the Del Monte name and symbol. (*Id.*) The footnoted material (*) advised:

> Del Monte supports steel can recycling. For information about recycling in your area, please contact the Steel Can Recycling Institute, 600 Anderson Drive, Pittsburgh, PA 15220.

(*Id.*)

3. The Chilling Effect of the Statute

The effect of the statute has been to eliminate rather than encourage truthful statements about the environmental attributes of consumer products. For example, Del Monte

determined that the "PRECIOUS METAL" advertisement quoted above, though truthful and accurate, could no longer be published in California as a result of the adoption of Section 17508.5. (84a) Del Monte also pulled a second advertisement that stated, under the heading "RECYCLING TIME" and a picture of a watch lying on a flattened steel can:

> This watch is a piece of junk. Its metal bearings are made entirely from recycled cans. In fact, the everyday "tin" can is made of 100% recyclable high grade steel. And if we all recycle, cans will provide the best means to build our bridges, skyscrapers, automobiles—even precision watches. The time to recycle is now.

(99a, 84a-85a) Other companies, as well, have removed environmentally-oriented labels from their packages out of concern that they could be criminally prosecuted for making accurate statements in a manner inconsistent with the requirements of California law. (83a)[3]

As a result of the statute, no representations covered by the statute can lawfully be made that products are "biodegradable" or "photodegradable" unless that process occurs within one year—even if the language at issue specifically (and truthfully) states that the process takes 18 months. Nor can truthful representations be made that packaging contains "5% recycled content" or that it is made from recycled industrial waste, because the statute imposes a wooden definition of "recycled" that requires 10% of the package content to be "postconsumer material" in all circumstances.

B. Procedural History of This Action

Petitioners brought this action against respondent, the Attorney General of California, in February 1992, alleging

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[3] One example cited to the courts below was the decision of Fisher Nut Company to remove from its labels a statement that the can that contained its mixed nuts was made of steel that was "recyclable where steel recycling facilities exist." (*Compare* copies annexed at the end of this petition at 100a and 101a)

that Section 17508.5 of the California Business and Professions Code violates their First Amendment rights by impermissibly restricting both commercial and non-commercial speech. Petitioners also alleged that certain of the statute's definitions were unduly vague in violation of the Due Process clause. Petitioners sought a declaration that the statute is unconstitutional and a permanent injunction against its enforcement pursuant to 28 U.S.C. §§ 2201-02.

In June 1992, based on their views about the national significance of the speech and environmental issues presented in this case and their belief that petitioners' challenge to the California statute "could cripple efforts to regulate environmental claims, both in California and elsewhere," respondents, the Environmental Defense Fund and Californians Against Waste, sought intervention as of right to defend the statute under Federal Rule of Civil Procedure 24(a). (Memorandum in Support of Motion to Intervene, Docket No. 9, at 13) The district court granted the intervention.

In July 1992, after petitioners and the Attorney General entered into a detailed stipulation of facts (70a-91a), petitioners moved for summary judgment on their claims. The Attorney General and the intervenor respondents opposed the motion on the ground that the statute is a permissible regulation of commercial speech. No claim was made that the motion should be denied on the basis of any alleged disputed issues of fact.

In an Order dated December 23, 1992 the district court held that the statute applied only to commercial speech and that the restrictions it imposed on such speech were constitutional. The court also held that the statute's definition of "recyclable" was unconstitutionally vague. Except as to that ruling, the district court denied petitioners' motion and *sua sponte* granted summary judgment to the State. The district court entered judgment accordingly on March 12, 1993.

Petitioners' appeal was filed with the court of appeals in July 1993, was opposed by respondents, and oral argument was heard on the appeal in September 1994. In an opinion written by Judge Choy and dissented from by Judge Noonan which was filed on November 18, 1994, the court of appeals affirmed the judgment of the district court. Petitioners' petition for rehearing with suggestion for rehearing *en banc* was denied by the court of appeals on February 23, 1995.

C. The Opinions of the Courts Below

Having interpreted the statute to apply only to commercial speech, the district court went on to hold that the statute met the requirements of the commercial speech test first set out by the Supreme Court in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980). The district court first concluded that the commercial speech at issue was not inherently misleading and therefore was entitled to First Amendment protection. (47a) Then, without the benefit of this Court's later rulings in *Rubin* v. *Coors Brewing Co.*, 115 S. Ct. 1585 (1995); *Ibanez* v. *Florida Dep't of Business and Professional Regulation*, 114 S. Ct. 2084 (1994); *Edenfield* v. *Fane*, 113 S. Ct. 1792 (1993); and *Cincinnati* v. *Discovery Network, Inc.*, 113 S. Ct. 1505 (1993), the court concluded that the statute directly advanced the state's asserted interests and that the "fit" between those goals and the statute's means was reasonable. (48a-53a)

In the course of its decision, which acknowledged that the State had prohibited even "completely accurate" product representations (51a),[4] the district court rejected a construction

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[4] The example offered by the court related to the statutory ban on the use of the word "recyclable" unless a product could be "conveniently recycled . . . in every county in California with a population over 300,000 persons." (51a) The statement that "this milk carton is recyclable in San Diego County," the court acknowledged, "might violate the statute even if it is completely accurate." (*Id.*) Although the statutory definition of the word "recyclable" was held unconstitutionally vague, the district court's concession plainly applies to all the other statutorily defined words as well.

of the statute urged by the State which would have limited the statute's application to circumstances in which the regulated words were used in isolation. (51a n.12) According to the State, the statutory definitions have "no application when the words are used in conjunction with modifiers which adequately dispel deception." *See infra*, p. 23 n.13. That statutory construction would have permitted the defined terms to be used in a fashion *inconsistent* with the statutory restrictions so long as "manufacturers and distributors choose to adequately explain in their advertisements and on their labels what they mean by the use of environmental terms." *Id.* In rejecting the State's proposed construction, the district court did not comment on the fact that the State itself had thus concluded that a far less speech-restrictive statute than that actually adopted by the California Legislature could accomplish all the asserted state interests.

On appeal, the court of appeals, in a two-to-one ruling, affirmed the district court's judgment, adopting much of the reasoning of the district court opinion. Without placing any significant burden on the State to justify the statute, and with scant reference to any record evidence, the majority opinion of the court of appeals held that California's statute directly advances its goals and that there is a reasonable fit between the statute's means and ends. (16a-25a)

Contrary to the requirements of *Edenfield*, *Ibanez* and *Coors*, the court of appeals did not require respondents to prove affirmatively that the statute alleviates a real harm to a material degree under the third prong of the *Central Hudson* test. As regards the requirement of a "reasonable fit" of the statute to the State's goals under the fourth prong of *Central Hudson*, the court of appeals simply ignored the significance of the State's concession in the district court that the statute should not apply at all if the defined terms are used with modifiers that dispel any potential to mislead. The majority opinion of the court of appeals offered no response to Judge Noonan's observation, in dissent, that the State's argument

"does point to the obvious, that with a minimum of effort the legislature could have provided that qualified use of the terms was acceptable." (32a) The majority opinion of the court of appeals also brushed aside other more speech-sensitive alternatives. (23a-24a)

Judge Noonan's dissent concluded that the statute could not be reconciled with the First Amendment. In his view the statute was not only unconstitutionally vague, but an example of viewpoint discrimination which could not "survive the test of rationality, let alone strict scrutiny." (32a)[5] The statute, he concluded, had only "a rough and speculative relation to the interest of the state . . . discriminates among speakers [and] is incompatible with the freedom assured by the First Amendment." (33a)

SUMMARY OF ARGUMENT

What California has essentially done by passing the statute at issue in this case is to write its own ecological dictionary and to require its use by certain—but not all—speakers by the threat of criminal punishment. "[C]ommercial advertisers," as Judge Noonan's dissent emphasizes, are treated "as the untrustworthy," while "nonprofits" to whom the words are

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[5] As Judge Noonan put it:

> Why have these particular words been made the subject of legislation? Why have Californians Against Waste and the Environmental Defense Fund been allowed to enter the case on the side of the state with the status of intervenors? Why do these intervenors defend the district court's decision with such skill, tenacity and vigor? Plainly because, as the intervenors declare, the words defined are "key environmental terms". In the Green Movement the words are powerful, evocative, almost sacred. There is a sense that they should not be profaned by casual usage. The legislation embodies a clear conviction that there are those who can be trusted to use them and those who cannot be trusted; for the legislation singles out commercial advertisers as the untrustworthy and leaves unregulated and trusted the nonprofits who believe the terms are key.

(31a-32a)

"powerful, evocative, almost sacred" are trusted to use them as they wish. (32a)

The case, as Point I of the petition demonstrates, has been understood from its commencement to raise major issues about the balance that may constitutionally be struck between commercial free speech rights and the public interest in avoiding potentially misleading speech. Other states have awaited the ruling in this case before adopting their own statutes; commentators have noted the impact of the case on "environmental claims all companies make for their products." More broadly, the case raises questions as to the authority of the government to define the very words in which debate about matters of the greatest public moment may proceed. Whether a state may become the official arbiter of the dictionary for society's discussion of any publicly controverted matter is well worthy of this Court's attention.

In that respect, the petition raises two specific issues with respect to the statute. The first, set forth in Point II of the petition, arises out of the utter irrationality of the statute and the fact that there are several far less restrictive alternatives available to accomplish its asserted ends. That the state itself has offered just such an alternative—a reading of the statute that would "tell advertisers to either use the terms as defined or tell the public how the term is being used in the advertisements"—illustrates the reality that the statute cannot begin to be squared with the First Amendment commercial speech jurisprudence of this Court as set forth from the Court's seminal opinion in *Central Hudson* through its most recent ruling in *Coors*.

The second issue, raised by Point III of the petition, is the one-sided nature of the statute which, as Judge Noonan's dissent demonstrates, amounts to nothing less than viewpoint discrimination. By limiting the language that "for-profit" speakers may use about environmental matters at the same time their critics are free to use the language with impunity, the statute falls under this Court's analysis in *R.A.V.* v. *City of St. Paul*, 112 S. Ct. 2538 (1992).

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS IMPORTANT ISSUES WORTHY OF THIS COURT'S REVIEW CONCERNING FIRST AMENDMENT PROTECTIONS AFFORDED THE TRUTHFUL USE OF COMMON LANGUAGE BY COMMERCIAL SPEAKERS IN THE CONTEXT OF A NATIONAL POLICY DEBATE

This case presents questions as to the extent to which a state may constitutionally regulate and redefine the "commercial" use of key words that are routinely used to describe environmental qualities of products that are sold throughout California and the nation. Both the district court decision and the decision of the court of appeals in this case open with reference to "green marketing" as "the marketing craze of the 1990's," a phrase from the "Green Report" issued by a ten-state task force of state attorneys general in 1990. (6a; 35a)[6] That report and much of the record in this case confirm that manufacturers and distributors of household goods (food, soap, and everything else in the supermarket) and the packaging of those goods (tin cans, glass bottles, paper boxes and plastic containers) are a major, if not dominant, source of information to consumers about the environmental attributes of almost every product that they buy. The parties have never been in dispute that consumers want this information; that they learn about the environmental impact of the goods they buy every day from advertisements and labels; and that it is important that they not be misled about that information. How to strike a constitutional balance between the right of advertisers to speak and the authority of the government to regulate speech that is no more than potentially misleading is what this case is about.

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[6] The states are California, Florida, Massachusetts, Minnesota, Missouri, New York, Texas, Utah, Washington and Wisconsin.

From the start, the case has been regarded as one of significant national import. Many states around the country have awaited the determination of the fate of California's regulation of environmental language before deciding what steps, if any, they may and should take. Environmental regulatory analysts have noted the paucity of newly introduced state environmental laws that have survived statehouse debate in the years since this action commenced, and have commented that "the main debate" centers on "freedom of commercial speech, and the outcome of the California litigation."[7] The Attorneys General of four states—Minnesota, Tennessee, Massachusetts and Washington—filed a brief amici curiae in support of respondents below, asserting that "[t]he outcome of this litigation is of importance to the states, in view of their obligation to enforce state consumer protection laws against companies engaged in false, deceptive and misleading environmental advertising." (Brief of Amici Curiae, Docket No. 29, at 1)[8]

The case has import beyond its impact on the ongoing debate on environmental policy—beyond, even, its impact on First Amendment law established in cases from *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), to *Rubin* v. *Coors Brewing Co.*, 115 S.

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[7] State Recycling Laws Update, Year-End Edition 1994, at 29 (Raymond Communications 1994); State Recycling Laws Update, Environmental Labeling Update 1994, at 10 (Raymond Communications 1994).

[8] Other observers, as well, have commented on the significance of both the California statute at issue here and this litigation. One article commenting on this case has concluded that "[i]f environmental marketing dies, California might be the burial site." Steven W. Colford, *Fade Out For Green?*, Advertising Age, Dec. 5, 1994, at 1. Another observed that "[m]anufacturers and advertisers throughout the nation are watching the battle with keen interest," concluding that "[w]hether California's law is ultimately upheld or overturned, it is likely to shape the environmental claims all companies make for their products." John Flinn, *Advertisers Take On Labeling Law; Seeing Red Over "Green,"* San Francisco Examiner, Jan. 3, 1995, at C-1.

Ct. 1585 (1995). The case matters, more broadly, because what the California legislature has done is not only to criminalize truthful and non-misleading speech about environmental qualities of commonly purchased products, but to define the very language in which an ongoing public debate about those matters may proceed. That was the basis for Judge Noonan's dissent, a dissent rooted in his view of the statute as "a zealous and unconstitutional intrusion by a state government into an area where technologies are developing, the free play of ideas is important, and the free speech of everyone, including manufacturers and distributors, is essential to the development of a healthy environment." (28a)[9]

It is undisputed that under the statute manufacturers and distributors of consumer goods may only use the word "recycled" on their products when they contain at least 10% post-consumer material. Their critics, in contrast, may and do use the word as they wish. Thus, on the inside cover of the Green Report—the recommendations of Attorneys General of ten states which is referred to in the first lines of both opinions below (6a; 35a)—the following words appear:

> The cover is printed on 50% recycled paper, 5% of which is post-consumer waste.
>
> The text is printed on 100% recycled paper, 5% of which is post-consumer waste.

(Exhibit 10 to Joint Stipulation of Facts, Docket No. 25) A better example could hardly be offered of the statute's impact: manufacturers and distributors of consumer goods are barred from placing on their products the very phrase "recycled paper, 5% of which is post-consumer waste" that the

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[9] When Section 17508.5 was proposed for enactment, the California Department of Consumer Affairs voiced similar concerns in opposing its adoption on the ground that "it would be premature to adopt definitions of ecological terms that are still largely undefined and subject to debate." (Appellants' Excerpts of Record submitted to the Ninth Circuit "ER" at 182)

document most relied upon by their critics contains on its cover.

The degree of governmental intrusion into the speech at issue itself warrants plenary review by this Court. When before, for example, has the Court been presented with the equivalent of the Joint Stipulation of Facts here that provided that "[e]xcept where specifically indicated" in the stipulation, the words "ozone friendly," "biodegradable," photodegradable," "recyclable," "recycled" and "consumer good" were *not* used as defined in Section 17508.5? (76a n.*) When before has the Court been presented with a statute that places such draconian limits on the most commonplace use of words that the parties to the litigation have found it literally impossible to use them?

The facts necessary to judicial resolution of this case have been stipulated to by the parties. Both sides have agreed that summary judgment (for one or the other side) is appropriate. It remains only for this Court to determine what the Constitution requires.

II. THE DECISION BELOW HOLDING THAT THE STATUTE IS A PERMISSIBLE REGULATION OF COMMERCIAL SPEECH CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT

In the past two years, this Court has rendered four opinions emphasizing the serious "affirmative burden" imposed upon a state under prongs three and four of the four-prong test for regulations on commercial speech first articulated in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 566 (1980). *See Rubin* v. *Coors* Brewing Co., 115 S. Ct. 1585 (1995); *Ibanez* v. *Florida Dep't of Business and Professional Regulation*, 114 S. Ct. 2084 (1994); *Edenfield* v. *Fane*, 113 S. Ct. 1792 (1993); and *Cincinnati* v. *Discovery Network, Inc.*, 113 S. Ct. 1505 (1993).[10]

[10] On May 1, 1995, this Court granted certiorari in *44 Liquormart Inc.* v. *Rhode Island*, 39 F.3d 5 (1st Cir. 1994), *cert. granted*, 63 U.S.L.W.

At a time when this Court has made increasingly clear the significant evidentiary showing required of states in order to justify their restrictions on commercial speech, and the searching analysis required of courts in evaluating the state's evidence, the Ninth Circuit has completely disregarded the dictates of this Court, deferring to the legislature as if rational basis review in this area had not been explicitly rejected by the Court in *Cincinnati*, 113 S. Ct. 1510 n.13, and failing even to cite or acknowledge in its *Central Hudson* analysis recent decisions of this Court (*i.e.*, *Cincinnati*, *Edenfield* and *Ibanez*) that were discussed at length in the parties' briefs. This Court's most recent opinion in *Coors* itself confirms that the opinion below—and the statute at issue here—cannot withstand First Amendment scrutiny.

Under *Central Hudson*, in analyzing a statute's effect on (1) truthful and non-misleading commercial speech, the statute cannot survive review unless the state can establish (2) a substantial government interest, (3) that such interest is directly advanced by the statute's restriction, and (4) that the statute is no more extensive than necessary to serve that interest. 447 U.S. at 566. Both the Ninth Circuit and the district court acknowledged that the words at issue here are not "inherently misleading" and are thus entitled to First Amendment protection.[11] *See Peel* v. *Attorney Registration and Disciplinary Commission*, 496 U.S. 91, 109 (1990); *Shapero* v.

3786 (U.S. May 1, 1995) (No. 94-1140). That case raises the question of whether a Rhode Island statute restricting liquor price advertising can be squared with this Court's commercial speech jurisprudence.

[11] Petitioners have in the past recognized, and do so now, that the terms regulated by Section 17508.5 could be used in ways that are confusing or misleading to some consumers. That, in fact, is why some of petitioners' members have themselves sought legislative or administrative relief to seek to ensure that consumers are fully informed. None of petitioners' members, however, have advocated guidelines which require that the public be told *less* than an advertiser can support or that sweep in and prohibit a broad range of highly specific messages that are neither false nor misleading. Section 17508.5, however, does just that.

Kentucky Bar Ass'n, 486 U.S. 466, 479 (1988). The parties agree that the state's interests in consumer protection and environmental conservation are substantial. The heart of this case—and the stark conflict between the opinion below and this Court's most recent cases—lies in prongs three and four of the *Central Hudson* test.

A. California's Restriction on the Use of Environmental Language by Commercial Speakers, as Written and as Construed by the Courts Below, Is Irrational and Does Not Directly Advance California's Interests to a Material Degree

If one principle stands out above all others as regards the third prong of the *Central Hudson* test, it is that when the "irrationality" of a "unique and puzzling regulatory framework ensures that [a] labeling ban will fail to achieve" its asserted end, *Coors*, 115 S. Ct. at 1593, it cannot pass First Amendment muster. Here, as in *Coors*, that is precisely what the regulatory framework ensures.

For example, in assessing Del Monte's "Precious Metal" advertisement (annexed at the end of this petition, 98a), which lauds the environmental attributes of the very "tin cans" in which Del Monte's products are packaged, the district court held, and the Ninth Circuit agreed, that educational or "informational advertisements that contain *generalized* expressions of an environmental attribute are not within the statute's ambit." (9a-10a; 39a-40a & n.6) (emphasis supplied) This reading of the statute was offered in a candid effort of the courts below to avoid any reading of the statute which could encompass non-commercial speech and thus "hoist the level of scrutiny" (40a) or "trigger strict scrutiny." (9a)[12] To this end, the courts below held that Section 17508.5 permits manufacturers and distributors to use the regulated terms to

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[12] No party or court reviewing this case has even suggested that Section 17508.5 can meet the strict scrutiny test.

say whatever they wish so long as their statements are phrased "generally" enough.

The result is utterly irrational. Del Monte may publish an advertisement with its name and logo prominently displayed on it which touts the very cans in which its products are sold because advertisements which laud the benefits of tin cans "*in general*" are not covered by the statute. (9a; 40a) (emphasis supplied) But Del Monte, so it seems, could run afoul of the statute if it asserts in so many words that consumers should purchase its peaches *because* they are packaged in "the world's most perfect container," a tin can that can be "recycled". To which the inevitable next question is: What can possibly be said to be accomplished by such a statute? Obviously, whatever risk supposedly posed to consumers or the environment by these advertisements is the same. It was just this sort of irrationality that led this Court in *Coors* to strike down a statute that prohibited statements of alcohol content on beer containers but not in beer advertisements. *Coors*, 115 S. Ct. at 1592.

The majority opinion of the Ninth Circuit further demonstrated the statute's irrationality (and thus its failure to directly advance the State's asserted interests) when it stated that speakers silenced by the statute may simply use "alternative expressions conveying perfectly well information about the modest environmental attributes of products not measuring up under Section 17508.5 (*e.g.*, 'this product contains x% [*reused/recaptured*] materials,' in lieu of 'recycled'; 'these trash bags will decompose in two years under x conditions,' in lieu of 'biodegradable')." (25a) (citations omitted) According to the Ninth Circuit, then, the ability of commercial speakers to use "other" words, *e.g.*, "reused" instead of "recycled," should assuage their First Amendment concerns. But by permitting words to be used which are surely no more inherently clear than the restricted terms, California has surely solved nothing—not its supposed consumer deception problem and not any environmental problem. Here, as in *Coors*—

where numerical disclosures of alcohol content on beer labels were prohibited in the service of combatting "strength wars" but descriptive terms suggesting high alcohol levels were permitted, 115 S. Ct. at 1592-93—there is no basis for concluding that the statute can truly advance any articulated State goal.

The burden of the state *affirmatively* to demonstrate the direct advancement of its goal has repeatedly been emphasized by this Court: "mere speculation or conjecture" or conclusory statements of government officials will not do. *Edenfield*, 113 S. Ct. at 1800. "[R]ather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* *Accord Cincinnati*, 113 S. Ct. at 1514-16.

Again, in *Ibanez*, this Court emphasized that the state must affirmatively justify its restrictions with real and specific—as opposed to merely speculative or conjectural—evidence. *Ibanez*, 114 S. Ct. at 2089. This burden must rest with the state, the Court explained, because "the 'free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.' " *Id.* (citations omitted). Most recently, this Court emphasized in *Coors* that the requirement that the government justify its statute with real evidence "was critical." 115 S. Ct. at 1592.

Here, California has failed to come close to doing so. In the proceedings below, the State argued, and the Ninth Circuit agreed, that the statute directly advances both a consumer protection goal and an environmental goal. As to the first, as pointed out by Judge Noonan in his dissenting opinion below, the entire factual basis for the district court's conclusion that the regulated words are potentially misleading—the supposed real harm—is "only one instance of one word, cited by a partisan of the statute and unproved in court." (30a) As Judge

Noonan observed, "[t]he true basis for this far-reaching conclusion, on which the [Ninth Circuit's] majority opinion so heavily relies, is speculation." (31a) "Speculation is no basis on which to support a criminal law licensing speech." (*Id.*, *citing Edenfield*, 113 S. Ct. at 1800). *See Coors*, 115 S. Ct. at 1592; *Ibanez*, 114 S. Ct. at 2089.

Just as the harms recited by the State are merely speculative, so too is the State's purported showing that Section 17508.5 " 'will in fact alleviate [those harms] to a material degree,' " as it must in order to pass constitutional muster. *Coors*, 115 S. Ct. at 1592; *Edenfield*, 113 S. Ct. at 1800. Without citation to anything in the record, the Ninth Circuit held that the statute "increases consumer knowledge and awareness and discourages exploitation and deception." (18a) But the entire record makes clear that the opposite is true. The State has not demonstrated that consumers will know that the defined terms carry their statutory meaning. In addition, Judge Noonan's dissenting opinion pointed to a level of vagueness of the State's definitions—particularly in their use of "natural" as an objective standard "in an environment and economy where there is scarcely any '*nature*' independent of human intervention"—which itself illustrates the failure of the State affirmatively to demonstrate that the statute would accomplish any of its asserted goals. (28a-29a) (emphasis supplied)

In holding that the statute directly advanced the State's goals, the Ninth Circuit acknowledged that "comprehensive economic data are lacking" (17a), but, following the district court, placed great emphasis on the "nexus between commercial representations and consumption." (18a) But that is not the relevant inquiry under *Coors*, *Ibanez* and *Edenfield*. Here, the State did not and could not show that barring use of the regulated terms in truthful, non-conforming messages actually helps consumers make more informed choices or encourages environmentally responsible conduct because the real result is that consumers, who learn about products'

"alleged ecological attributes from packaging labels" (17a), are in fact deprived of truthful and accurate information about those attributes. "Any 'interest' in restricting the flow of accurate information because of the perceived danger of that knowledge is anathema to the First Amendment; more speech and a better-informed citizenry are among the central goals of the Free Speech Clause. Accordingly, the Constitution is most skeptical of supposed state interests that seek to keep people in the dark for what the government believes to be their own good." *Coors*, 115 S. Ct. at 1597 (Stevens, J., concurring) (citing *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 769-70 (1976); *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 374-75 (1977)).

B. The Existence of Several Less Restrictive Alternatives to California's Statute Establishes That There Is No Reasonable Fit Between the Statute's Means and Its Asserted Ends

In *Cincinnati* this Court emphasized that in order to establish the "reasonable fit" required by *Board of Trustees* v. *Fox*, 492 U.S. 469, 480 (1989), between a statute's regulatory means and its asserted ends so as to satisfy the fourth prong of the *Central Hudson* test, the state must "affirmatively" demonstrate through record evidence that the statute is "narrowly tailored" and its costs "carefully calculated." *Cincinnati*, 113 S. Ct. at 1510 & n.12 (citation omitted). Regulations which disregard far less restrictive and more precise means of achieving the government's asserted objectives are not narrowly tailored. *Coors*, 115 S. Ct. at 1593-94; *Cincinnati*, 113 S. Ct. at 1510 n.13.

In analyzing the statute to see whether there exists a "reasonable fit" between its regulatory means and ends, the Ninth Circuit majority overlooked entirely the significance of the State's concession at the district court level that the statute should be read to apply *only* to situations in which the terms were used in isolation; the statute, the State then

argued, had *no* application where the words were used in conjunction with modifiers which adequately dispel deception.[13] In other words, a far less restrictive rule than Section 17508.5 would have served all of the interests claimed by the State to justify the statute.

Judge Noonan noted in his dissent that "the abandoned argument does point to the obvious, that with a minimum of effort the legislature could have provided that qualified use of the terms was acceptable." (32a) Indeed, that the State failed to consider the scope and impact of Section 17508.5's application before this litigation "indicates that [the State] has not 'carefully calculated' the costs and benefits associated with the burden on speech imposed by its" statute. *Cincinnati*, 113 S. Ct. at 1510. The import of this is clear: where, as here, there is an obviously less-burdensome alternative to the restriction on commercial speech, the "fit" between ends and means is not reasonable. *Coors*, 115 S. Ct. at 1593-94; *Cincinnati*, 113 S. Ct. at 1510 n.13.

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[13] The State's brief read as follows:

> [The State] respectfully suggests the correct way to interpret Section 17508.5 is as follows: the legislature only meant to define the words of the section when they are used in isolation, because then, without an agreed upon definition, they carry a great potential to be misleading; further the definition has no application when the words are used in conjunction with modifiers which adequately dispel deception.
>
> * * * *
>
> [I]f manufacturers and distributors choose to adequately explain in their advertisements and on their labels what they mean by the use of environmental terms, then Section 17508.5 has no application.
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> * * * *
>
> [M]anufacturers and distributors are free to advertise the claimed environmental attributes of their products so long as they fully explain what the words they use mean in relation to the claim for that product.
>
> * * * *
>
> [Section 17508.5] tells advertisers to either use the terms as defined or tell the public how the term is being used in the advertisements.

(92a-97a)

The State's proposed judicial/legislative solution is not the only example of a means brushed aside by the Ninth Circuit that is both more fitting to the State's goals and more sensitive to First Amendment concerns. The Ninth Circuit failed even to address that other states and the federal government have, without constitutional difficulty, flexibly balanced the interest in protecting consumers against the interest in the free flow of commercial ideas. Recent Federal Trade Commission guidelines permit qualifying language in order to explain the context in which particular environmental terms are used. FTC Guides for the Use of Environmental Marketing Claims, 16 C.F.R. Part 260 (1994).[14] In addition, as Judge Noonan pointed out, Maine has enacted legislation expressly adopting the FTC guidelines approach in its entirety. Me. Rev. Stat. Ann. tit. 38, § 2142 (West Supp. 1994).

Beyond that, precisely the same sort of legislative solution is available here that the Court referred to in *Coors*: legislation directly requiring more environmentally sound packaging would obviate the need for a statute limiting speech;[15] so would continued enforcement of Sections 17500 and 17508 of the California Business and Professions Code—which predated Section 17508.5 and which prohibit false or misleading advertising and marketing claims generally. (*See* 67a-69a, 85a-86a) The case-by-case review afforded by those laws promotes full and accurate disclosure and is particularly suited to the regulation of ecological terms which are the "subject of debate" and ongoing "[t]echnological changes." (Statement of

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[14] Adherence to the FTC guidelines is no defense under the California statute.

[15] *Coors*, 115 S. Ct. at 1593-94. The court of appeals' quotation with approval of the district court's conclusion that "the Supreme Court has specifically rejected the notion that the court should second guess a legislative decision to restrict speech rather than to require more speech" (25a) cannot be squared with *Coors*. Moreover, as *Coors* and all the recent cases ignored by the court of appeals demonstrate, it is hardly "second guessing" for a court to assure that First Amendment standards have been met.

the California Department of Consumer Affairs, ER 182) (*See* 28a) (Noonan, J., dissenting)

III. CALIFORNIA'S ONE-SIDED STATUTORY RESTRICTION ON THE USE OF CRITICAL ENVIRONMENTAL LANGUAGE BY "FOR PROFIT" SPEAKERS IMPERMISSIBLY DISCRIMINATES ON THE BASIS OF VIEWPOINT CONTRARY TO THIS COURT'S TEACHINGS IN *R.A.V.* v. *CITY OF ST. PAUL*

In *R.A.V.* v. *City of St. Paul*, 112 S. Ct. 2538 (1992), this Court held that even those regulations that are limited in their reach to cover only traditionally "unprotected" or lesser protected categories of speech must undergo a heightened strict scrutiny analysis when they discriminate on the basis of viewpoint. This Court held facially invalid in that case an ordinance prohibiting bias-motivated disorderly conduct because it imposed special prohibitions on those speakers who expressed disfavored views on the subjects of "race, color, creed, religion or gender." *Id.* The Court reasoned that even traditionally unprotected "fighting words" could not be selectively silenced on the basis of the underlying message expressed. The Court made clear that the same strict scrutiny analysis would also apply to other categories of speech which customarily receive lesser protection, expressly including commercial speech regulations, that go beyond mere content regulation to actual viewpoint discrimination. *Id.* at 2546.

This case raises the question of whether California, in its effort to regulate environmental advertising, has transgressed those boundaries. Judge Noonan so concluded, on the ground that Section 17508.5's regulation of only the "for profit" speakers constitutes a form of viewpoint discrimination destined "to be held a violation of the First Amendment unless, strictly scrutinized, it is shown to be narrowly tailored to serve a compelling state interest." (32a) (*citing R.A.V.* v. *City of St. Paul*, 112 S. Ct. 2538, 2547 (1992)) The majority opinion offered no response.

The effect of the statute is not in dispute. Manufacturers and distributors may not urge upon prospective consumers that their products are biodegradable within two years, however truthful that statement may be. The very word "biodegradable" is stripped from their vocabulary unless they use it as the California legislature has decreed. But, as Judge Noonan pointed out, Californians Against Waste and others in the Green Movement are free to use the term as they like in the course of seeking to persuade the public that only products that are biodegradable within one year are worthy of their environmental accolades. (*See* 32a)

So it is with all the words. Critics of manufacturers or distributors of goods may, as we pointed out earlier, freely describe their own offerings as having been printed on "recycled paper, 5% of which is post-consumer waste"; manufacturers or distributors risk criminal penalties if they do so. As Judge Noonan observed, "[s]uch a distinction between speakers, made by a legislature, has a name: viewpoint discrimination." (32a) *See MD II Entertainment, Inc.* v. *City of Dallas*, 28 F.3d 492, 495 (5th Cir. 1994) (citing *R.A.V.*, recognizing applicability of strict scrutiny to viewpoint discriminatory regulations of commercial speech); *Citizens United for Free Speech II* v. *Long Beach Township Board of Commissioners*, 802 F. Supp. 1223, 1232 (D.N.J. 1992) (following *R.A.V.*, applying heightened level of review to content-based regulation of commercial speech); *cf. Cincinnati* v. *Discovery Network, Inc.*, 113 S. Ct. at 1520-21 (Blackmun, J., concurring).

Instead of reaching all speakers in California, Section 17508.5 effectively restricts only manufacturers and distributors from using those " 'key environmental terms' " which, "[i]n the Green Movement . . . are powerful, evocative, almost sacred." (32a) (Noonan, J., dissenting) But California "has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of

Queensbury Rules." *R.A.V.*, 112 S. Ct. at 2548. *See also Boos* v. *Barry*, 485 U.S. 312 (1988).

The fact that manufacturers' use of the regulated terms occurs in a commercial context provides no basis for upholding restrictions on such use so long as the information conveyed is truthful and not misleading. *Coors*, 115 S. Ct. at 1595 (Stevens, J., concurring). "A legislature cannot privilege one set of speakers as the good guys, while restraining another set of speakers as the baddies. When the speakers use the same language, it's not difference enough that one speaks for profit and the other for 'nature.' " (32a) (Noonan, J., dissenting) The statute, however, undeniably favors non-commercial speakers over commercial speakers, self-styled environmental watchdogs over distributors of products, the Green Movement over those it disdains. Whether the First Amendment permits such disparate treatment is well worthy of this Court's consideration.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
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